INDEX TO PETITION FOR WRIT OF CERTIORARI

	Page
Opinions below	1
Jurisdiction	2
Questions presented	3
Constitutional and statutory provisions involved	4
Statement	5
1. The Avansino trial	5
2. The Gaggi trial	8
3. The first Sessa-Stombelline trial	9
4. The second Sessa-Stombelline trial	12
5. The Costanza trial	14
Reasons for granting the writ	19
1. The pendency of the Mishkin case	19
2. The important scienter issue	19
3. The important questions as to obscenity standards	23
4. The important search and seizure question	28
Conclusion	30
Appendix (denial of leave to appeal)	31

CITATIONS

Cases:

A Quantity of Books v. Kansas, 378 U.S. 205 ....28, 29, 30
Evans v. United States, 153 U.S. 584 23
Friedman v. New York, No. 135, Oct. Term 1965 19
Ginzburg v. United States, No. 42, Oct. Term 1965 24
Jacobellis v. Ohio, 378 U.S. 184 28
Keney v. New York, No. 39, Oct. Term 1965 22

Page

Larkin v. G. I. Distributors, Inc., 19 App. Div. 2d 609, aff'd 14 N.Y. 2d 869 27
Manual Enterprises v. Day, 370 U.S. 478 .....20, 26, 28
Marcus v. Search Warrant, 367 U.S. 717 .....28, 29
Mishkin v. New York, No. 49, Oct. Term 1965 .....3, 19
People v. Finkelstein, 9 N.Y. 2d 342 22
People v. Finkelstein, 11 N.Y. 2d 300 22
People v. Richmond County News, 11 App. Div. 2d 799, 205 N.Y.S. 2d 94 22
People v. Richmond County News, 9 N.Y. 2d 578 27
Roth v. United States, 354 U.S. 476 .....17, 19, 23
Sheperd v. New York, No. 626, Oct. Term 1965 ..19, 22, 23
Smith v. California, 361 U.S. 147 .....18, 19, 20, 22, 24
United States v. Klaw, 350 F. 2d 155 (C.A. 2) 27

STATUTORY PROVISIONS:

18 U.S.C. § 1461 20
§ 1141, New York Penal Law 5, 22, 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

ALFRED AVANSINO, ET AL., *Petitioners*,

v.

PEOPLE OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF NEW YORK, FIRST DEPARTMENT

The petitioners—Alfred Avansino, Nicholas Gaggi, Charles Sessa, Peter Stombelline, and Matthew G. Costanza—pray that a writ of certiorari issue to review the judgments of the Appellate Term of the Supreme Court of New York, First Judicial Department, rendered in these proceedings on October 21, 1965.

OPINIONS BELOW

No opinions were rendered in connection with petitioners' convictions and the appeals therefrom. Each petitioner was found "guilty" of violating § 1141 of the New York Penal Law, and each conviction was

"affirmed" upon the consolidated appeals. Thereafter Associate Judge Fuld denied petitioners leave to appeal to the Court of Appeals of New York; see appendix hereto.

JURISDICTION

Petitioner Avansino was found guilty of violating § 1141 of the New York Penal Law on November 27, 1963, by three judges of the Criminal Court of the City of New York. On January 7, 1964, he was sentenced to 60 days' imprisonment and fined $500 (in default of which he was sentenced to an additional 60 days' imprisonment).

Petitioner Gaggi was found guilty of a similar charge under § 1141 on November 15, 1963, and was sentenced on January 27, 1964, to 30 days' imprisonment and fined $500 (in default of which he was sentenced to an additional 90 days' imprisonment).

Petitioners Sessa and Stombelline were jointly found guilty of violating § 1141 on two separate occasions. The first convictions were entered on December 4, 1963; on February 17, 1964, Sessa and Stombelline were each sentenced to 30 days' imprisonment and each fined $500 (in default of which an additional 30 days' imprisonment was imposed on each). On the second trial, Sessa and Stombelline were found guilty of violating § 1141 on March 3, 1964, and each received the following sentences on May 28, 1964: imprisonment for 30 days and a fine of $500 (in default of which an additional 30 days' imprisonment was imposed on each).

Petitioner Costanza was found guilty of violating § 1141 on November 8, 1963, and was sentenced on

January 23, 1964, as follows: on the first count, he was sentenced to imprisonment for three months and fined $500 (in default of which he was sentenced to an additional three-month imprisonment); on the second count, he was sentenced to a three-month imprisonment, to run concurrently with the three-month imprisonment imposed on the first count.

The appeals of all five petitioners were consolidated. On October 21, 1965, the Appellate Term of the Supreme Court, First Department, affirmed all the convictions. On November 16, 1965, Associate Judge Fuld denied each petitioner leave to appeal to the Court of Appeals of New York. This petition for a writ of certiorari is filed within 90 days following that denial.[1]

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether a so-called "sadistic" or "masochistic" book, similar in nature to those involved in the *Mishkin* case now pending before this Court, can be considered obscene, for purposes of a state obscenity prosecution, under any definition of obscenity permitted by the Due Process Clause of the Fourteenth Amendment.

2. Whether state court convictions of book store clerks for having sold an allegedly obscene book and allegedly obscene photographs of nude and semi-nude

---

[1] On January 5, 1966, Mr. Justice Harlan signed an order staying further proceedings and continuing previously fixed bail as to petitioners Avansino, Gaggi, Sessa and Stombelline. The State did not object to the entry of such an order since some of the issues herein are similar or identical to those pending before the Court in *Mishkin* v. *New York*, No. 49, Oct. Term 1965.

females can be sustained under the Due Process Clause of the Fourteenth Amendment in the absence of any allegation or direct proof as to their knowledge or scienter regarding the obscene nature of the book or the photographs.

3. Whether state court convictions of book store clerks for having sold allegedly obscene photographs of nude and semi-nude females and an allegedly obscene book can be sustained under the Due Process Clause of the Fourteenth Amendment where (1) the defense is precluded from offering evidence of other published photographs that might be relevant in determining the contemporary community standards by which the obscenity of the photographs in question is to be judged, and (2) there is no proof offered by the prosecution as to the obscene nature of the photographs or the book other than the photographs and the book themselves.

4. Whether a conviction under § 1141 of the New York Penal Law, predicated upon evidence obtained pursuant to a judicially authorized search warrant that permitted the seizure of whatever the arresting officer deemed obscene, can be sustained under the Due Process Clause of the Fourteenth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment IV:

> The right of the People to be secure . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Amendment XIV, Section 1:

. . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

New York Penal Law, Section 1141:

§ 1141. Obscene Prints and Articles

1. A person who sells, lends, gives away, distributes, shows or transmutes, or offers to sell, lend, give away, distribute, show or transmute, or has in his possession with intent to sell, lend, distribute, give away, show or transmute, * * * or otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting book, magazine, pamphlet, * * * writing, drawing, photograph, motion picture film, figure, image, * * *

2. In any manner hires, employs, uses or permits any person to do or assist in doing any act or thing mentioned in this section, or any of them,

Is guilty of a misdeameanor * * *.

STATEMENT

The five trials which led to this consolidated proceeding may be summarized as follows:

1. The Avansino Trial

By means of a printed information form, which did little more than repeat the words of § 1141 of the New York Penal Law, Avansino was charged with having sold or distributed on September 19, 1963, "a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, pamphlet, story paper, writing, paper, picture, drawing and photograph, and written, printed and recorded matter of an indecent character, whereof a more particular description

would be offensive to this court, and improper to be spread upon the records thereof, wherefore such description is not here given." R. 2.

At the trial, the State's sole witness was Patrolman Hemingway. He testified that on September 19, 1963, at about 10 a.m., he entered a store at 228 West 42nd Street in New York City. R. 5-6. Books and pictures were offered for sale in the store. Hemingway noticed that the defendant Avansino, a clerk, was behind the cash register at the counter. R. 6.

Hemingway proceeded to walk around the store, looking at various photographs on display on the counter near where the defendant Avansino was standing. He noticed on this counter "pictures of single and double females in various poses with their bare breasts and buttocks exposed and various items of clothing used as props." R. 7. These photographs were wrapped in transparent cellophane wrappers, permitting the top and bottom pictures to be seen. R. 8. After looking through various packages of pictures, Hemingway selected one and took it to the defendant Avansino. In Hemingway's words, "I said, 'How much are these?'. He said, 'A dollar fifty.' I then paid him a dollar fifty." R. 8-9. Avansino thereupon put the package in a paper bag, which he sealed with scotch tape.

There were 12 photographs in the package purchased by Hemingway, all of which were admitted into evidence. R. 15. After making this purchase, Hemingway identified himself as a police officer and placed Avansino under arrest. R. 16. He also seized and removed 392 other picture packages, wrapped in cellophane, which were on display on the counter. R. 16.

Four of these packages, each containing about 12 pictures, were introduced into the record over objection. R. 19-21. These packages had been seized with the aid of a fellow officer and were placed in a carton for removal purposes. R. 25.

Prior to the arrest no conversation occurred between Hemingway and Avansino other than the inquiry and answer with respect to the price of the one package, $1.50. R. 24-25. After the arrest, the conversation was limited to Avansino's identification and pedigree. R. 21-22.

The foregoing constituted the entire case for the State. The defense thereupon moved to dismiss on the grounds that a prima facie case had not been established, that there had been no showing of scienter on the defendant's part, that the State had failed to show the climate and morality of the community in terms of the obscenity of the pictures, and that the State had not shown that these pictures were "hard-core pornography." R. 27-28. The motion to dismiss was denied.

The defense was limited to an attempt by defense counsel, acting as a witness, to introduce as an exhibit the December 1963 issue of Playboy Magazine that he had purchased at a news stand. R. 30. It was urged that this magazine was relevant to the determination of the obscenity of the pictures in question, showing the moral climate of the community and the availability to the public of similar pictures. R. 31. But the court sustained the State's objection to the receipt of this magazine in evidence. R. 31.

The court immediately found that all of the pictures which had been purchased from Avansino were "ob-

scene." R. 33.[2] Avansino was accordingly found guilty as charged. R. 32. Later, at the hearing on the sentencing, an Assistant District Attorney argued that this finding as to obscenity inherently meant that the pictures in question met all three tests of obscenity, i.e., "that the material was patently offensive, that it was an appeal to prurient interest, and that it was hard-core." R. 48-49. He also stated that "there have been cases involving pictures of this very type which resulted in convictions before this arrest and that were appealed and settled in the Appellate Courts and held to be pornography within the meaning of 1141." R. 50.

2. The Gaggi Trial

By information, Gaggi was charged with violating § 1141 by selling on April 10, 1963, to one Frederick Jenoure "three packets of obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting pictures, whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given." R. 134.

At the trial, Patrolman Jenoure testified that on April 10, 1963, he entered a book store at 228 West 47th Street. Magazines, books and photographs were on sale there. The defendant Gaggi was observed close to the cash register at the counter near the door. R. 138.

Jenoure went to the counter, looked over the photographs on display there, and selected three packages.

---

[2] At the sentencing, which occurred before a different three-judge panel, one of the judges commented with respect to Avansino: "All he had to do is look at the photographs and he knows they're no good. He knows they're rotten. He wouldn't want his son to look at it." R. 46.

He handed them to the defendant Gaggi[3] and "I asked him how much they were, and he told me that it would be $3.50, and I gave him the money, and he put the photographs in a small bag, and handed them to me." R. 139. He immediately placed Gaggi under arrest.

Over objection, the three packets of pictures, which had been wrapped in cellophane, were received as exhibits. R. 142. Since the packets had been opened, Jenoure was unable to recall which pictures had been visible through the original wrappings. R. 143. The three packets contained, respectively, 20, 4 and 24 photos. R. 144-145.

The State's case having been closed, the defense moved to dismiss the information on the ground that the pictures introduced into evidence, "while they may depict females in various stages of undress, these are neither indecent nor suggestive, and . . . do not come within the purview of Section 1141 of the Penal Law." R. 145-146. This motion was denied. Also denied was a motion to acquit upon the ground that there was a reasonable doubt as to the defendant's guilt. R. 146. The trial court never formally found Gaggi guilty, see R. 146-147, but the sentencing court (composed of three different judges) stated: "Let the record show that this defendant on November 15th was tried and found guilty as charged . . ." R. 149.

3. The First Sessa-Stombelline Trial

By the first count of an information, Sessa and Stombelline were charged with having sold, on April 10, 1963, to one John A. Kennedy, "certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic

---

[3] At this point, Jenoure apparently asked Gaggi "if he had anything better, and he said, 'Isn't that good enough?'." R. 140

and disgusting pictures, whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given." R. 154. In a second count of the information, Sessa and Stombelline were similarly charged with having sold to one Patrick Hayden "a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book entitled 'Promenade Bondage Volume 4.'" R. 153.

At the trial, Patrolman Kennedy testified that he had entered a book store at 117 West 42nd Street on April 10, 1963, at about 5:40 p.m. R. 156. After browsing around the store, he went to the picture rack in the back of the store; the defendant Sessa was sitting behind a cash register near that rack. He thumbed through the packs of black-and-white pictures and handed a couple of them to Sessa, stating "put that on the side for me." R. 157. He then asked Sessa, "do you have anything a little better than that." R. 157. Sessa replied, "over there," pointing to a different section of the same rack that contained color photographs. R. 158. Kennedy, noting that there appeared to be four pictures in each pack, said to Sessa, "these are very good . . . the best I have seen around." To which Sessa responded, "oh yes, only the best . . . the best in the whole Times Square area." R. 158.

Sessa, when asked what made these pictures better than anybody else's, remarked that "we use the best of everything . . . the best material, the best photography." R. 158. Then, having selected several packs, Kennedy told Sessa "okay, I will take them." R. 158. The price for the black-and-white and color pictures—

all of which were packaged in glassine envelopes—came to $7.50. Kennedy gave Sessa a $10 bill, received the change and the pictures in a paper bag, and left the store. R. 160.[4]

About two minutes later Kennedy re-entered the Store in the company of a fellow patrolman, one Patrick Hayden. Kennedy went to the back of the store where Sessa was and asked him whether "I can get arrested for having these kind of pictures." R. 160. Sessa responded, "no, I don't think so." To which Kennedy replied, "well I am a policeman, you are under arrest for selling pornographic pictures." R. 160.

The various photographs purchased by Kennedy were thereupon introduced into the record over objection, being offered only as against Sessa. R. 166. The State's later attempt to have these exhibits introduced as against Stombelline was frustrated by the court. R. 169-171.

Patrolman Hayden then testified that he had entered the store at the time of Patrolman Kennedy's re-entry. He observed the defendant Stombelline at the cash register near the front door. R. 168. He browsed through a book shelf and picked out a book called "Promenade Bondage." Hayden took the book to Stombelline and asked "how much"; upon being told that the price was $4, Hayden gave Stombelline a $5 bill. While Stombelline was making change, he was asked by Hayden if he had "any better books than

[4] Kennedy had observed that the defendant Stombelline was at the cash register near the front door, but was unable to recount any of Stombelline's actions during the conversation and transactions between Kennedy and Sessa. R. 161-162.

that," to which he replied "this is the best there is." R. 169. After receiving the book and the change, Hayden identified himself and placed Stombelline under arrest. R. 169.

Following receipt of the book in evidence, R. 171, Hayden testified that he had asked both Sessa and Stombelline who employed them and was told by both that the B.C. Book Manufacturing Corp. of 117 West 42nd Street was their employer. R. 172.

The State thereupon rested its case. The first count, relating to the sale of the photographs, was then dismissed as to Stombelline; and the second count, relating to the sale of the book, was dismissed as to Sessa. R. 173-174. But the court denied defense motions to dismiss completely on the ground that the State had failed to make out a prima facie case. R. 174. And, after hearing defense counsel urge that the pictures and the book were in bad taste but were not obscene, the court found "each item introduced into evidence to be in violation of law," R. 180, and the defendant Sessa guilty under the first count and the defendant Stombelline guilty under the second count, R. 180.

4. The Second Sessa-Stombel ne Trial

A subsequent two-count information charged that Sessa and Stombelline on November 1, 1963, sold to one Douglas J. Ferrary certain "obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting pictures," not otherwise described or identified. R. 187.

The trial produced the evidence of Patrolman Ferrary. He testified that he entered the book store at 117 West 42nd Street at about 5 p.m. on November

1, 1963. R. 190. There were about 20 people in the store. He noticed both Sessa and Stombelline, the former being in the front of the store behind the cash register and the latter walking about conversing with other people. R. 192-193.

Ferrary then noticed photographs on display in front of the cash register. They were packaged in cellophane. He picked up a packet and asked Stombelline how much it cost, the reply being $3. Ferrary turned around to Sessa, who was then standing in front of the cash register, and purchased the packet. R. 194. Ferrary received the right change for the purchase after Sessa had placed the packet in a brown paper bag sealed with scotch tape. R. 194-195. The 20 photographs contained in the packet, together with the paper bag, were received in evidence. R. 195, 197.

Ferrary thereupon revealed his identity and placed both Sessa and Stombelline under arrest. At the same time, seizure was made of 528 packages of photos. R. 198. The two defendants were taken to the station house, where for the first time the cellophane packet purchased by Ferrary was opened and its contents examined. R. 203. Thus ended the State's case.

Defense motions to dismiss for failure to establish a prima facie case and to acquit for failure to prove guilt beyond a reasonable doubt were denied. R. 213, 220. With reference to the motion to acquit, defense counsel urged that the photographs in question were not obscene in the sense that they were not hard-core pornography; such pictures of semi-nude females were said to be within the constitutionally protected area of the First Amendment. R. 214. It was further argued that these pictures were among that which is

currently countenanced by community standards, R. 217, but the court denied a defense effort to introduce a current issue of Playboy Magazine in order to demonstrate those standards, R. 219.

Both defendants were thereupon found guilty as charged on both counts. R. 220. Each of the photographs in evidence was found to be "in violation of the law." R. 220.

5. The Costanza Trial

In a two-count information, Costanza was charged with (1) selling on August 27, 1963, to one George Garcia four packages of "obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting photographs," and (2) possessing on the same date, with intent to sell, twenty-five packages of identically described photographs.

Prior to trial, a hearing was held upon Costanza's motion to vacate a previously issued search warrant and to suppress certain property as evidence against him. R. 56. At this hearing, Patrolman Garcia testified that he had entered a book store at 117 West 42nd Street on August 26, 1963, and purchased four packages of photographs. R. 64. Thereafter he made application to the Criminal Court of the City of New York for a search warrant based upon this purchase, claiming in an affidavit that he had observed in the store "a large selection of photographs in cellophane envolopes, in which were displayed photographs of females in various stages of undress and posed in an indecent manner." R. 60. He added that in some of these photos "the buttocks of such females were accentuated and various items of clothing such as panties and

brassieres were used as props to accentuate the naked breasts and buttocks and private area of these females." R. 60.

A search warrant, signed by a Judge of the Criminal Court, was then issued, permitting a search of the described premises for "property" consisting of "obscene, lewd and indecent photographs, which are being sold or offered for sale or stored in violation of section 1141 of the Penal Law." R. 59. The warrant contained a recital that there was probable cause for believing that certain property "consisting of obscene, lewd and indecent photographs of females in various poses of an indecent manner and in various stages of undress" that were "now before this court to be viewed" and photographs of a similar nature "are being sold or offered for sale at a bookstore located at premises 117 West 42 St." R. 59. The four packages that had been purchased were submitted to the Judge in connection with obtaining this warrant. R. 65.

On the next day, August 27, Patrolman Garcia revisited the store in order to execute the warrant. He again purchased four packages; thereupon, having exhibited the warrant, Garcia seized an additional 25 packages. R. 66. He thought that the seized pictures were "more or less the same pictures" he had purchased earlier which led to the issuance of the warrant. R. 66. About two minutes had elapsed between Garcia's reentry into the store and the purchase of the four packages, during which interval Garcia looked through all the photograph packs that he seized after showing the warrant. R. 105.

At the conclusion of this testimony, the motion to suppress was denied and the State was directed to prepare an information. R. 67.

At the trial, Patrolman Garcia was the sole witness for the State. He testified that he had entered the store on August 27 at about 3 p.m. and went directly in front of the cash box in the front of the store, behind which the defendant Costanza was standing. R. 76. Next to the cash box was a counter with a rack containing photograph packages wrapped in cellophane. Garcia picked out four packages and purchased them from Costanza for $5, the packages being placed in an envelope. R. 76. Garcia did not open the packages at this point. The photographs, which were later taken from the wrappers, were introduced over objection into the record. R. 82.

Following the purchase, Garcia identified himself as a police officer, arrested Costanza, and exhibited the search warrant. R. 86. Garcia thereupon seized the twenty-five additional packages of photographs remaining in the rack next to the cash register. R. 86. Objections were made to the receipt of any of these seized packages in evidence on the ground that their cellophane wrappings had been broken and were not in the same condition as they were at the time of the seizure. R. 93. The objection was overruled and seven of the packages, including the top and bottom pictures which could be viewed through the cellophane, were admitted as exhibits. R. 95-102.

Garcia further testified that, after the arrest and seizure, he asked Costanza if he owned the store; Costanza replied that he was only a sales clerk employed to sell everything in the store. R. 102. The name of the owner was given to Garcia, but he could not recall it. R. 103. The premises were then closed and a further search was made, but Garcia

"did not find any other things that I seized as evidence." R. 104.

No further evidence was offered by the State. Defense motions to dismiss on grounds that the photographs were not hard-core pornography, that the information was too indefinite, that the State had failed to establish a prima facie case with respect to the defendant's knowledge or other ingredients of the crime, and that possession had not been established under the second count were all denied. R. 107-109.

The only defense witness was the defense attorney, who testified that he had purchased the June 1963 issue of Playboy Magazine at a news stand in Grand Central Station. R. 110-112. Without objection, this magazine was admitted as an exhibit. R. 112.

The defense thereupon moved to acquit or dismiss on grounds that guilt had not been established beyond a reasonable doubt. Counsel urged that the pictures did not infringe the community standards of obscenity. But the motion was denied and the defendant was found guilty on both counts. R. 120. The court stated that the exhibits had all been viewed and each of them found to be obscene. R. 121.

Following the convictions, all five petitioners appealed to the Appellate Term of the Supreme Court. The appeals were consolidated. Among the points raised on the consolidated appeals were: (1) whether photographs of nude or semi-nude females could be considered either hard-core pornography or obscene under the test enunciated in *Roth* v. *United States*, 354 U.S. 476; (2) whether the informations were fatally

defective, under the principles of *Smith* v. *California*, 361 U.S. 147, in failing to allege knowledge of the alleged obscenity on the part of each defendant, and whether the informations were fatally defective in failing to specify and describe the material and the manner in which it was obscene; (3) whether the convictions were invalid, under the *Smith* decision, for failure to prove the defendants' knowledge of the alleged obscenity; (4) whether the book "Promenade Bondage," Vol. 4, was obscene under federal constitutional standards; (5) whether the evidence received against Costanza should have been suppressed as the product of an unlawful search and seizure; (6) whether the refusal to receive in evidence a copy of Playboy Magazine, as some evidence of contemporary community standards, compelled reversal of the convictions of Avansino, Sessa and Stombelline; and (7) whether Gaggi's conviction was valid in light of the trial court's failure formally to find him guilty.

Following the summary affirmance of the convictions by the Appellate Term, these contentions were renewed in seeking leave to appeal to the New York Court of Appeals. Judge Fuld, in denying such leave, stated that among the contentions advanced before him were arguments that § 1141 of the New York Penal Law, as construed and applied here, was repugnant to the Fourteenth Amendment's due process clause and that the petitioners had been deprived of due process of law as required by the Fourteenth Amendment. See appendix hereto.

REASONS FOR GRANTING THE WRIT

1. The pendency of the Mishkin case

Among the questions now pending before this Court in *Mishkin* v. *New York,* No. 49, Oct. Term 1965, is whether the so-called sadistic-masochistic publications there involved can be considered obscene under federal constitutional standards, particularly those set forth in *Roth* v. *United States,* 354 U.S. 476, 489.

The same type of publication formed the basis for the first conviction of petitioner Stombelline. He was convicted for selling a copy of "Promenade Bondage," Vol. 4, a book with 67 pages of text and photographs concerning two girls who fight, bind and spank one another. Precisely the same federal constitutional question emerges from that conviction as is involved in *Mishkin*—whether such a publication can be termed obscene.

If the *Mishkin* case is still pending before this Court at the time this petition is under consideration, it would be appropriate to withhold action as to this aspect of the instant petition until *Mishkin* is resolved. See similar questions raised in the petitions being held, pending the outcome of *Mishkin,* in *Friedman* v. *New York,* No. 135, Oct. Term 1965, and in *Sheperd* v. *New York,* No. 626, Oct. Term, 1965. Once the *Mishkin* case has been decided, of course, appropriate disposition of the question here presented can be made in light of that decision.

2. The important scienter issue

This Court held in *Smith* v. *California,* 361 U.S. 147, 155, that "all mental elements" cannot, consistent with the Constitution, be removed from a prosecution for the

crime of possessing or selling obscene material.[5] But expressly left open by the *Smith* decision was "the sort of mental element . . . requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock." 361 U.S. at 154. As Mr. Justice Frankfurter said in concurrence, 361 U.S. at 161, "How much or how little awareness that a book may be found obscene suffices to establish scienter, or what kind of evidence may satisfy the how much or the how little, the Court leaves for another day." See also *Manual Enterprises* v. *Day*, 370 U.S. 478, 493.

The instant proceedings bring into sharp focus the problem left open by the *Smith* decision, the problem as to the nature and degree of proof of scienter requisite to an obscenity prosecution in a state court. In none of the five trials here involved was there any proof whatever that the defendants had knowledge that any of the materials sold were legally obscene. Not one defendant was shown to have packaged any of the photographs or to have been familiar with the individual photographs. As to conversations with police officers, only the following was shown:

(a) Petitioner Avansino merely replied "$1.50" when asked the price of a package of pictures. R. 8-9. No other statements were made. R. 24.

(b) Petitioner Gaggi similarly quoted a $3.50 price for several packages of photographs, R. 139, and, when

---

[5] See also *Manual Enterprises* v. *Day*, 370 U.S. 478, 492, construing the "obscene-advertising" proscription of 18 U.S.C. § 1461 as requiring proof, even in a civil proceeding, that the publisher *knew* that at least some of his advertisers were offering to sell obscene material.

asked if he had anything better, replied "Isn't that good enough?" R. 140.

(3) Petitioner Sessa, at the time of his first arrest, allegedly pointed out to the police officer "a little better" pictures in color, stating that "they are the best in the Times Square area" and that "we use the best material, the best photography." R. 158. He also replied in the negative when asked if one could get arrested for "having these kind of pictures." R. 160. At the time of his second arrest, petitioner Sessa was alleged to have done no more than to look at the package of pictures in the course of completing the sales transaction. R. 194.

(4) At the time of his first arrest, petitioner Stombelline apparently stated the price of the book "Promenade Bondage" and stated "this is the best there is" when asked if there were any better books. R. 169. On the second occasion, Stombelline was not reported as saying anything other than the price of the pictures selected by the arresting officer. R. 210.

(5) Petitioner Costanza gave only the price of the photographs when asked by the arresting officer. R. 76.

In short, the prosecutions followed the all too familiar pattern of proving only that the defendant sales clerks sold material believed by the arresting officers to be obscene and later so found by the courts, and that some of them, when asked, engaged in some "puffing" of the material. To find knowledge or scienter under these circumstances one must assume, although the record does not so show, that the clerks knew what was in each sealed package or book and knew that all of the photographs therein were legally obscene. Can

that assumption suffice to show the mental element "requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book [or photograph] in stock"? *Smith* v. *California, supra* 154.[6]

Precisely that same question is posed in the petition for certiorari pending before the Court in *Sheperd* v. *New York,* No. 626, Oct. Term 1965;[7] and much the same problem is present in *Keney* v. *New York,* pending on petition for certiorari, No. 39, Oct. Term 1965.[8] It would thus seem apparent that New York courts are permitting, as a matter of course in ob-

---

[6] Proof of scienter is also required, as a matter of state law, in establishing a violation of § 1141 of the New York Penal Law. *People* v. *Finkelstein,* 9 N.Y. 2d 342, 344-345. It has been held that such knowledge cannot be imputed merely from the title and cover picture of a magazine sold by the defendant. *People* v. *Richmond County News Inc.,* 11 App. Div. 2d 799, 205 N.Y.S. 2d 94. But knowledge has been imputed where the circumstances showed lurid statements on the covers, a $5 selling price boldly stamped on the front covers, and voluntary admissions by the defendants that they "had seen worse books than those here involved." *People* v. *Finkelstein,* 11 N.Y. 2d 300, 304.

[7] The fourth question presented in the *Sheperd* petition is "Whether a state court conviction of a manager or clerk of a book store for having sold or permitted the sale of an 'obscene', 'sadistic' or 'masochistic' book can be sustained under the Due Process Clause of the Fourteenth Amendment in the absence of allegation in the information as to knowledge or scienter as to the character of the book sold and in the absence of any direct proof thereof or any definitive standard as to the degree of proof required."

[8] The second question presented in the *Keney* petition is "Whether a state court conviction of a bookseller for having sold obscene books can be sustained under the Fourteenth Amendment where the jury is charged that the necessary scienter may be found solely by inference drawn from the titles, the covers and the contents of the books, the bookseller concededly not having read the books or been advised of their obscene nature."

scenity prosecutions, inferences of knowledge to take the place of direct proof of knowledge. This practice makes it all the more essential that this Court inquire into the extent to which such inferences may alone support a constitutionally permissible obscenity prosecution. Guide lines are necessary not only for the lower courts to follow but for the constitutional protection of book and magazine and photograph sellers. Without such guide lines, those sellers are at the mercy of whatever inference, however unjustified, the judge or jury may wish to draw as to scienter.

And, as in the *Sheperd* case now before this Court,[9] the instant informations filed against the petitioners allege no more than that they "unlawfully" sold or permitted to be sold the allegedly obscene materials. No allegation is made that the petitioners "knowingly" sold obscene materials, despite the constitutional scienter requirement. Such a failure to allege a constitutionally essential element of the crime may itself be a violation of the Due Process Clause of the Fourteenth Amendment. Cf. *Evans* v. *United States,* 153 U.S. 584, 608. But when that failure is combined with an absence of any direct proof of scienter, the need and appropriateness of a definitive exploration of the problem by this Court become compelling.

3. The important questions as to obscenity standards

The proceedings below raise several significant constitutional questions stemming from the single test established in the *Roth* case, 354 U.S. at 469, for determining whether challenged material is obscene:

---

[9] See the fourth question presented in the *Sheperd* petition, quoted in footnote 7, *supra.*

"whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

(1) Can an obscenity conviction be sustained where the defense is precluded from offering any evidence as to the contemporary community standards by which the material in question is to be judged? In both the Avansino trial and the second Sessa-Stombelline trial, defense efforts to shed light on such community standards, through introduction of issues of Playboy Magazine, were rejected by the trial courts.[10] That magazine, openly and widely sold to the public, contained photographs of nude and semi-nude females which arguably were as revealing and provocative, if not more so, than the photographs in issue; thus the magazine might well have been relevant in assessing the contemporary standards and tolerance of the community. See *Ginzburg v. United States,* No. 42, Oct. Term 1965, now pending for decision.

An important question raised but not resolved in *Smith* v. *California,* 361 U.S. 147, 149, n. 4, is thus inescapably presented. In that case the defendant had been denied the right to proffer evidence as to other publications, openly sold, that might have been relevant to establishing the community standards. In his concurrence, 361 U.S. at 165-166, Mr. Justice Frankfurter wrote that in applying the *Roth* test

> ". . . it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those 'contemporary

[10] A copy of Playboy Magazine was allowed to be introduced in the Costanza trial, R. 110-112, but there is no indication that the trial court in any way relied upon the magazine in evaluating contemporary community standards.

> community standards' are. Their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge. It bears repetition that the determination of obscenity is for juror or judge not on the basis of his personal upbringing or restricted reflection of particular experience of life, but on the basis of 'contemporary community standards.' . . . it was violative of 'due process' to exclude the constitutionally relevant evidence proffered in this case."

And Mr. Justice Harlan indicated, 361 U.S. at 171-172, that

> "I agree with my Brother Frankfurter that the trier of an obscenity case must take into account 'contemporary community standards' . . . This means that, regardless of the elements of the offense under state law, the Fourteenth Amendment does not permit a conviction such as was complained of here unless the work is found substantially to exceed the limits of candor set by contemporary community standards. . . . While a State is not debarred from regarding the trier of fact as the embodiment of community standards, competent to judge a challenged work against those standards, it is not privileged to rebuff *all* efforts to enlighten or persuade the trier. . . . In my opinion this conviction is fatally defective in that the trial judge, as I read the record, turned aside *every* attempt by appellant to introduce evidence bearing on community standards."

The importance of the question here raised, as well as the appropriateness of a resolution thereof by this Court, is fully demonstrated by these statements of Mr. Justice Frankfurter and Mr. Justice Harlan.

(2) Can these convictions be sustained in the absence of any proof by the State, other than the book

and the photographs themselves, that the book and each photograph satisfies the obscenity standard prescribed by the *Roth* case?

In each of the instant cases before this Court, the trial judges simply found, without elaboration, that the photographs in question and the one book involved were "obscene." And the State's proof of that obscenity consisted solely of the submission of the photographs and the book to the trial judges. No other effort was made to prove that these materials, to the average person and under contemporary community standards, had as their dominant theme an appeal to prurient interest.

The absence of such proof raises a most significant constitutional question as to the degree of proof of obscenity under the *Roth* standard. Are the materials in question to be judged solely within the mind of the trier of facts without reference to any extrinsic evidence other than the materials themselves? If so, how can an appellate court determine whether the trier of facts applied the correct standards? Does appellate review under such circumstances become a *de novo* trial, the appellate judges being forced to view the materials anew and make their own independent judgments as to their obscenity?

The book and the photographs here involved are certainly tawdry and in poor taste by any standard. But it can be said that, under current community standards, sexually provocative photographs and books are not necessarily obscene. There are "many portrayals of the female nude that society tolerates" and "not every portrayal of male or female nudity is obscene." *Manual Enterprises* v. *Day*, 370 U.S. 478, 490. Not even the fact that the photographs or the book may be

deemed "dismally unpleasant, uncouth, and tawdry" is enough to make them "obscene." *Ibid.* And it can be argued that the photographs, which portray no private parts or acts of intercourse, are not the "hard-core pornography" which alone constitutes obscenity under § 1141 of the New York Penal Law, as interpreted by the New York Court of Appeals. *People* v. *Richmond County News,* 9 N.Y. 2d 578, 586. Certainly, judging by what community standards apparently tolerate today, these pictures can be said to come within the allowable area. See *Larkin* v. *G.I. Distributors, Inc.,* 19 App. Div. 2d 609, affirmed 14 N.Y. 2d 869 (holding non-obscene certain magazine photographs virtually indistinguishable from those here involved).

By what standards, then, did the courts below determine these materials to be obscene? Was it because the materials were thought to appeal to the prurient interest of the average person? Or was it because the judges thought that contemporary community standards would not tolerate the materials? Did the judges deem the "Promenade Bondage" book sold by petitioner Stombelline to be appealing to the prurient interest of the average person or only of some deviant group?

Certainly no evidence produced by the State provides any basis for answering those questions. As in *United States* v. *Klaw,* 350 F. 2d 155, 167 (C.A. 2), "the only predicate for any conclusion about prurient appeal was the material itself, as if *res ipsa loquitur.*" Like the jurors in the *Klaw* case, the trial judges here were "left to speculate" and were "invited to behold the accused material and, in effect, conclude that it is

undesirable, it is distasteful, it is disgusting." *Ibid.* Thus the triers of fact here may well have equated patent offensiveness to prurient appeal, or may have substituted their own personal standards for those of the contemporary community, contrary to the teachings of this Court. See, e.g., *Manual Enterprises* v. *Day, supra,* 482; *Jacobellis* v. *Ohio,* 378 U.S. 184, 191-192.

Neither appellate courts nor counsel should be forced to speculate, in the absence of evidence, about the grounds upon which materials have been held to be obscene. Without something more substantial in the way of evidence than the materials themselves, the fate of such defendants is made dependent upon the unknown and unknowable motivations of the triers of fact. Such an undesirable situation, which is widely prevalent in both state and federal obscenity prosecutions, is a compelling reason for the grant of certiorari herein.

4. The important search and seizure question

In *Marcus* v. *Search Warrant,* 367 U.S. 717, this Court held violative of the Fourteenth Amendment a state search and seizure scheme, with reference to allegedly obscene books, magazines and photographs, that gave the broadest possible discretion to the executing officers in seizing materials that in their view were obscene. Without any prior judicial determination as to the materials deemed to be obscene and without any specification in the warrants of the magazines to be seized, the search warrants provided no guide to the exercise of informed discretion. Subsequently, in *A Quantity of Books* v. *Kansas,* 378 U.S. 205, the plurality opinion of Mr. Justice Brennan viewed as

equally unconstitutional a state search and seizure scheme which authorized the sheriff to seize all copies of specified books thought to be obscene and which did not afford a hearing on the obscenity issue before the search warrant issued.

Petitioner Costanza was here convicted on the basis of a mass of photographs seized pursuant to a judicially authorized search warrant which gave the arresting officer unlimited discretion to seize "property . . . consisting of obscene, lewd and indecent photographs . . . as more particularly described above." R. 59. The so-called description defined the photographs as consisting of "obscene, lewd and indecent photographs of females in various poses of an indecent manner and in various stages of undress." R. 59. Pursuant to that warrant, and within about two minutes from the time he entered the store (R. 105), the police officer went through all the photograph packets, purchased four of them, and seized the remainder. In that short period of time, he alone had to determine whether the packets, which he did not open, contained photographs of an "obscene, lewd and indecent" nature. And there was no opportunity afforded Costanza or the store owner to contest the *ex parte* obscenity determination prior to the mass seizure.

These circumstances warrant exploration to determine if the principles of the *Marcus* and the *Kansas* cases have been violated. Photographs, no less than books, are entitled to constitutional protection if they are not obscene. But if seizure of photographs "precedes an adversary determination of their obscenity, there is danger of abridgment of the right of the public in a free society to unobstructed circulation of non-

obscene" photographs. *A Quantity of Books* v. *Kansas, supra,* 213. And, like books, photographs should not be considered contraband so as to permit use of the lower standards governing searches and seizures with respect to such items as narcotics, gambling paraphernalia and other contraband.

Because of the wide spread nature of photographic sales it is appropriate for this Court to determine the constitutional principles applicable to their search and seizure and to assess the validity of the seizure in this instance.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HERALD PRICE FAHRINGER
One Niagara Square
Buffalo, New York 14202

EUGENE GRESSMAN
1730 K Street, N. W.
Washington, D. C. 20006

Counsel for Petitioners

February 11, 1966

APPENDIX

COURT OF APPEALS OF THE STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent*,

against

ALFRED AVANSINO, MATTHEW G. COSTANZA, NICHOLAS GAGGI, CHARLES SESSA and PETER STOMBELLINE,

Defendants-Appellants.

Certificate Denying Leave

I, STANLEY H. FULD, Associate Judge of the Court of Appeals of the State of New York, certify that the above-named appellants, through their attorney Herald P. Fahringer, Esq., after notice to the District Attorney of New York County, and within the time and in the manner prescribed by Section 520 of the New York Code of Criminal Procedure, duly presented to me an application for a certificate that a question of law was involved in the above matter which ought to be reviewed by the Court of Appeals. In such application, it is argued that the order of the Appellate Term of the Supreme Court of the State of New York, entered on the 21st day of October, 1965, affirming the judgment of the Criminal Court of the City of New York, County of New York, convicting the appellants of violations of Section 1141 of the Penal Law of the State of New York, is contrary to the United States Constitution, Fourteenth Amendment, because said statute, as construed and applied, is repugnant to the due process clause of the Fourteenth Amendment of the United States Constitution as more fully set forth in the appellants' brief submitted to me, and the appellants further charge that they were deprived of liberty without due process of law as required by the said Fourteenth Amendment to the United States Constitution as more fully set forth in their brief.

After hearing counsel and upon the record and proceedings herein, I am denying the application because, in my opinion, no question of law is presented which ought to be reviewed by the Court of Appeals and I accordingly deny permission to appeal.

Dated, New York, New York
November 16, 1965

/s/ STANLEY H. FULD
Associate Judge of the
Court of Appeals